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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 121022572-3075-02]

RIN 0648-XC318

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to 2013 Annual Catch Limits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This action reduces the Atlantic herring 2013 sub-annual catch limits in herring management area 1A to account for catch overages in 2011, and to prevent overfishing.

DATES: This rule is effective from [insert date 30 days after date of publication in the FEDERAL REGISTER] through December 31, 2013.

ADDRESSES: Copies of supporting documents, the 2010-2012 Herring Specifications and Amendment 4 to the Herring Fishery Management Plan (FMP) are available from: John K. Bullard, Northeast Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. This document is also accessible via the Internet at <http://www.nero.noaa.gov>. NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of this rule. Copies of the FRFA and the Small Entity Compliance Guide are available from: John K. Bullard, Regional Administrator, National

Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930-2276, or via the internet at <http://www.nero.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Lindsey Feldman, Fishery Management Specialist, 978- 675-2179, fax 978-281-9135.

SUPPLEMENTARY INFORMATION:

Background

The New England Fishery Management Council (Council) developed herring specifications for 2010-2012, which were approved by NMFS on August 12, 2010 (75 FR 48874). The Herring FMP divides the stock-wide herring ACL (91,200 mt) among three management areas, one of which has two sub-areas. Area 1 is located in the Gulf of Maine (GOM) and consists of an inshore section (Area 1A) and an offshore section (Area 1B). Area 2 is located in the coastal waters between Massachusetts and North Carolina, and Area 3 is on Georges Bank (GB). Each management area has its own sub-ACL to allow greater control of the fishing mortality on each stock component. The management area sub-ACLs established for 2010-2012 were: 26,546 mt for Area 1A, 4,362 mt for Area 1B, 22,146 mt for Area 2, and 38,146 mt for Area 3.

Amendment 4 to the Herring FMP (Amendment 4) (76 FR 11373, March 2, 2011) revised the specification-setting process, bringing the Herring FMP into compliance with ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the FMP, if NMFS determines catch will reach 95 percent of the sub-ACL allocated to a management area or seasonal period, then NMFS prohibits vessels from fishing for, possessing, catching, transferring, or landing more than 2,000 lb (907.2 kg) of

herring per trip from that area or seasonal period. This AM slows catch to prevent or minimize catch in excess of a management area or seasonal period sub-ACL. As a way to account for ACL overages in the herring fishery, Amendment 4 also established an AM that provided for overage deductions. If the catch of herring in any given management area in any given fishing year exceeds any sub-ACL, the overage will subsequently be deducted from the corresponding management area sub-ACL in a subsequent fishing year. A range of additional AMs are currently being considered as a part of the 2013-2015 specifications process. Until then, the current AMs, including the overage deduction addressed in this rule, are still in place.

Final Adjustment to the 2013 Annual Catch Limits

The 2011 Atlantic herring fishing year began on January 1, 2011, and ended on December 31, 2011. Based on dealer, VTR, and observer data, 2011 herring catch exceeded the sub-ACL in Area 1A by 1,425 mt. There were no sub-ACL overages in the other herring management areas. Therefore, NMFS is required to deduct the Area 1A overage in 2011 from the 2013 Area 1A sub-ACL. At the time of this final rule, the Atlantic herring 2013 specifications have not yet been finalized. The 2013-2015 herring specifications are currently in development and will not be effective prior to the 2013 herring fishing year, which begins on January 1, 2013.

The Council's Scientific and Statistical Committee (SSC) met on September 13, 2012, and again on November 19, 2012, and recommended herring acceptable biological catch (ABC) levels for 2013-2015. The Council expects to take final action at its January meeting, and a proposed and final rule for the 2013-2015 herring specifications will follow. Although the 2013 herring specifications will not be in place on January 1, 2013, the regulations at § 648.200(d)

include a provision that allows the previous years' specifications to roll over to the following year(s) when new specifications are delayed past the start of the fishing year. Therefore, in accordance with regulations at § 648.201(a)(3), this action deducts the 1,425-mt 2011 overage in Area 1A from the 2013 Area 1A sub-ACL. Since the 2012 herring specifications will be in place on January 1, 2013, this action adjusts the rolled over sub-ACL in Area 1A until the 2013-2015 specifications are finalized. As a result, NMFS is revising the sub-ACL for Area 1A from 26,546 mt to 25,121 mt (a reduction of 1,425 mt). When the 2013 specifications are finalized, NMFS will deduct the 1,425-mt overage from the final 2013 Area 1A sub-ACL.

Comments and Responses

NMFS received five comment letters on the proposed rule for this action from the following: The Cape Cod Commercial Hook Fishermen's Association (CCCHFA); Coalition for the Atlantic Herring Fishery's Orderly, Informed, and Responsible Long-Term Development (CHOIR); the Conservation Law Foundation (CLF) and Earthjustice, both on behalf of the Herring Alliance; and a member of the public.

Comment 1: CCCHFA, CHOIR, CLF, and the member of the public commented in support of adjusting the 2013 Herring sub-ACL in Area 1A to account for catch overages in 2011.

Response: NMFS agrees and is adjusting the 2013 Area 1A sub-ACL to account for 2011 Area 1A sub-ACL catch overages in this final rule.

Comment 2: CCCHFA, Earthjustice, and CHOIR commented that the catch overage of 1,425 mt in Area 1A indicates that the current monitoring, reporting methods, and AMs in the Atlantic herring FMP are not sufficient to prevent sub-ACL overages.

Response: The comment on NMFS's ability to adequately monitor catch in the herring fishery, and comments on the reporting methods and AMs in the Herring FMP are beyond the scope of this rulemaking, which simply implements the AM currently required under the Herring FMP. Nevertheless, NMFS believes the current reporting and monitoring methods and AMs are sufficient to adequately monitor the fishery on a real-time basis. However, NMFS recognizes the difficulties in monitoring high volume fisheries, such as the herring fishery, in which the fleet catches and lands large volumes of fish in a very short period of time. We currently monitor the herring quota using a combination of daily VMS reporting, weekly VTR reporting, and weekly dealer reporting. We recognize that VMS catch reports may overestimate catch, and that data errors in catch reports, late reporting, or non-compliance have been a challenge to monitor the fishery in real-time. While we believe that the current reporting and monitoring methods are sufficient to adequately monitor this fishery on a real-time basis, it is imperative that vessels and dealers report catch and landings consistently and accurately. We are currently planning outreach meetings with the Atlantic herring industry to discuss ways to improve the accuracy of catch reporting to improve the timing of management area closures. In addition, for the 2013-2015 herring specifications, the Council is considering a range of AMs to better ensure that herring catch does not exceed management area sub-ACLs. Moreover, under the National Standard Guidelines at 50 CFR 600.310(g)(3), if herring fishery exceeds the stockwide herring ACL, the stock's ACLs and AMs may be reexamined.

Comment 3: Earthjustice and CHOIR commented that NMFS should modify the overage deduction AM so that NMFS deducts any sub-ACL overages from the following year's sub-ACL, instead of from the 2nd fishing year after the overage. CHOIR noted that waiting until two

years after the catch overage to account for any sub-ACL overages could have a significant impact on the herring resource.

Response: Like Comment 2, this comment on adjusting the AMs is beyond the scope of this rulemaking, which NMFS is implementing under the limited authority under the Herring FMP. AMs must be adjusted through a Council action, such as the 2013-2015 specifications or a future framework or amendment. This action is an inseason adjustment to the herring ACL. Because this is not a framework adjustment or amendment.

Furthermore, there is no evidence that accounting for sub-ACL overages in the year after determining the total catch has a significant adverse impact on the herring resource. For example, there is no evidence that a single year delay versus an immediate deduction the year following an overage affects the reproductive potential of the stock. Herring is a relatively long-lived species (over 10 years) and the fishery harvests multiple year classes. These characteristics suggest that the herring stock may withstand a single year delay in overage deductions. Moreover, the herring stock is neither overfished nor subject to overfishing at this time.

Comment 4: Earthjustice criticized NMFS' discard accounting methodology for the herring fishery. Earthjustice believes that discards coded as "fish not known (fish nk)" contain substantial amounts of herring, which should have been included in the amount of Atlantic herring caught during the 2011 fishing year. In referenced prior comments, Earthjustice argues that counting "fish nk" as herring catch would change the amount of the overage and overage deduction. When calculating a herring discard estimate, they recommended that NMFS assume all "fish nk" discarded from limited access herring vessels are Atlantic herring and that the fleet-

wide estimate of discarded “fish nk” should be added to the discard estimate of herring to calculate total herring discards in 2011.

Response: NMFS calculated 2011 herring discards consistent with how it calculated discards in 2010, as recommended by the Herring Plan Development Team (PDT). Herring discards are estimated by dividing the amount of observed herring discards (labeled “herring” and “herring not known (herring nk”) in observer haul logs) by the amount of all observed fish landed. NMFS then multiplies that discard ratio by the amount of all fish landed for each trip to calculate total amount of herring discards in 2011. If an observer verifies that fish are Atlantic herring, they code those fish as “herring” and if the observer identifies the fish as a type of herring but cannot verify species of herring, the observer codes those fish as “herring nk.” Only in the instance where an observer cannot verify species identification on discarded catch, does the observer code that discard event as “fish nk.” When developing the discard methodology, the Herring PDT concurred that NMFS should calculate the discard estimate for the herring based on the amount of observed “herring” and “herring nk” and that it should not include discards coded as “fish nk.”

NMFS does not believe it is appropriate to count discards coded as 'fish nk' as Atlantic herring. Including 'fish nk' discards in determining the amount of an overage would likely overstate the overage. 'Fish nk' consists of a mix of multiple species and is not limited to Atlantic herring. And while excluding 'fish nk' discards would likely understate the overage, any understatement would be an extremely small percentage of the sub-ACL for Area 1A. Total 'fish nk' discards for the Atlantic herring fishery in 2011 are estimated at 510 mt, equaling less than 1 percent of the 26,546 mt quota in Area 1A, and only a portion of those total discards occurred in

Area 1A. Given these facts, we believe that when choosing between including all or including none of the 'fish nk' discards, the better course is to not include 'fish nk' discards.

Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Herring FMP, other provisions of the MSA, and other applicable law.

NMFS completed the National Environmental Policy Act analysis to support this action in Amendment 4 (76 FR 11373, March 2, 2011).

This final rule has been determined to be not significant for purposes of Executive Order 12866. This final rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

NMFS, pursuant to section 604 of the Regulatory Flexibility Act, has prepared a FRFA, included in the preamble of this final rule. The FRFA describes the economic impact that this final rule, along with other non-preferred alternatives, will have on small entities.

The FRFA incorporates the economic impacts and analysis summaries in the IRFA, a summary of the significant issues, if any, raised by the public in response to the IRFA, and NMFS' responses to those comments. A copy of the IRFA, the RIR, and the EA are available upon request (see ADDRESSES).

Statement of Objective and Need

In 2011, there was a herring catch limit overage in herring management area 1A equal to 1,425 mt. In accordance with regulations at § 648.201(a)(3), this action deducts the 2011 management Area 1A overage from the 2013 management Area 1A catch limits. Since the 2013

specifications will not be finalized by January 1, 2013, and the 2012 specifications will be in place at the start of the herring fishing year, this action revises the rolled over sub-ACL for Area 1A for 2013 from 26,546 mt to 25,121 mt to account for 2011 the catch overage. When NMFS finalizes the 2013 herring specifications, it will deduct the 1,425 mt from the final 2013 Area 1A sub-ACL.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

There were no issues related to the IRFA raised in public comments.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

All participants in the herring fishery are small entities as defined by the SBA under the Regulatory Flexibility Act, as none grossed more than \$4 million annually, so there would be no disproportionate economic impacts on small entities. In 2011, 93 vessels were issued limited access herring permits, and 2,149 were issued open access herring permits.

Total herring revenue in 2011 equaled approximately \$22.4 million for limited access vessels, and \$43,000 for open access vessels. NMFS estimates the reduced sub-ACL in Areas 1A to equal approximately \$400,000 in lost revenue for the fishery in 2013. While this action reduces the amount of fish available for harvest, both the fishery-wide and individual-vessel economic effects are anticipated to be minimal, because the reduction overall and per vessel is relatively minor, as compared with the fishery's overall revenue, and because it only affects one of the herring management areas.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action. In addition, there are no Federal rules that duplicate, overlap, or conflict with this rule.

Description of the Steps the Agency Has Taken to Minimize the Significant Economic Impacts on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

Amendment 4 analyzed the effects of deducting ACL/sub-ACL overages from the subsequent corresponding ACL/sub-ACL. During a year when the fishery exceeds the ACL/sub-ACL, fishery participants may benefit economically from higher catch. In the subsequent year, when NMFS deducts the amount of the overage from that ACL/sub-ACL and the amount of

harvest is lower, fishery participants may experience negative economic impacts. Since the participants in the fishery from year to year vary, there could be a minor economic impact on the fishery participants operating in Area 1A in 2013 due to the overage deduction from 2011.

Authority: 16 U.S.C. 1801 et seq.

Dated: February 19, 2013

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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